



POLICE DEPARTMENT

September 26, 2012

MEMORANDUM FOR: Police Commissioner

Re: Detective David Gross
Tax Registry No. 901639
Missing Persons Squad
Disciplinary Case Nos. 2010-0051 & 2011-3510

The above named member of the Department appeared before the Court on June 21 and July 24, 2012, charged with the following:

Disciplinary Case No. 2010-0051

1. Said Detective David Gross, assigned to the 94th Precinct Detective Squad, while on duty on September 21, 2008, at approximately 1700 hours, while in the vicinity of 71 04 Woodhaven Boulevard, Queens County, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: Detective Gross kicked Neal Malangone in the torso, without proper police necessity.

P.G. 203-11, Page 1, Paragraph 2 USE OF FORCE

2. Said Detective David Gross, assigned as indicated in Specification One, at time, date and location set forth in Specification One, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: Detective Gross struck Neal Mala[n]gone on the right rear side of his head with a blunt instrument, without proper police necessity.

P.G. 203-11, Page 1, Paragraph 2 USE OF FORCE

Disciplinary Case No. 2011-3510

1. Said Detective David Gross, assigned to Missing Persons Squad, on or about August 12, 2010, and thereafter, having received information from [REDACTED], the owner of [REDACTED] Club ([REDACTED]), that [REDACTED] had stolen a handbag containing US currency belonging to an employee of Pumps, said Detective Gross did fail and neglect to prepare and submit a Complaint Report (UF-61).

P.G. 207-01, Page 1 – COMPLAINTS

2. Said Detective David Gross, assigned to Missing Persons Squad, while on duty on or about August 17, 2010, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: Said Detective Gross conducted an unauthorized investigation, in that without an official Department complaint, he proceeded to a residence in the confines of the 113th Precinct to investigate an alleged larceny.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

3. Said Detective David Gross, assigned to Missing Persons Squad, while on duty on or about August 17, 2010, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit Said Detective Gross, utilized a Department vehicle to conduct an unauthorized investigation.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

4. Said Detective David Gross, assigned to Missing Persons Squad, while on duty on or about August 17, 2010, being present at a residence, address known to the Department, within the confines of the 113th Precinct, to conduct an unauthorized investigation of an alleged larceny, and receiving information that reasonable cause existed that [REDACTED] had committed said larceny, said Detective Gross did fail and neglect to arrest [REDACTED].

P.G. 208-01, Page 1, Paragraph 3(b) LAW OF ARREST

5. Said Detective David Gross, assigned to Missing Persons Squad, while on duty on or about August 17, 2010, directed a member of the Department to utilize a Department computer to access Department records for reasons unrelated to the official business of the Department or the City of New York.

P.G. 219-14, Page 1, Paragraph 2 DEPARTMENT COMPUTER SYSTEMS

The Department was represented by Paul Gallagher, Esq., Department Advocate's Office.

Respondent was represented by James Moschella, Esq., Karasyk & Moschella LLP.

Respondent, through his counsel, entered a plea of Not Guilty to Case No. 2010-0051. He pleaded Guilty to Case No. 2011-3510, but no mitigation testimony was offered at the hearing. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case No. 2010-0051, Respondent is found Not Guilty. In Case No. 2011 3510, having pleaded Guilty, Respondent is found Guilty.

Case No. 2010-0051

Introduction

Respondent and other 94 Detective Squad detectives were assigned to a case in which Neal Malangone was the suspect. His girlfriend's mother had filed a complaint against him for throwing a garbage can through the mother's residential window, leading to physical injury. Malangone was observed leaving his residence and tracked to a bank. The alleged misconduct by Respondent occurred within the automatic teller machine (ATM) vestibule of the bank.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Neal Malangone and Katarzyna Wyka as witnesses.

Neal Malangone

Malangone was 27 years old and last was employed in 2008, at a pub in Queens. He was married [REDACTED]. He was 6 feet, 2 inches tall.

On September 21, 2008, Malangone was living [REDACTED] with his mother and his now-wife, Katarzyna (Kasia) Wyka. Shortly before 5:00 p.m., Malangone left home and walked with Wyka to a Chase Bank location at the intersection of Metropolitan Avenue and Woodhaven Boulevard. It took them about three minutes to arrive. He entered the ATM lobby while Wyka waited outside.

Malangone reached the ATM area and had his ATM card in his right hand. As he was preparing to take out cash, he heard brakes screeching. He turned and saw a black sedan pull up on the side of the bank.

Department's Exhibits (DX) 2a-d and 2f-u (there was no 2e) were still frames of three video cameras (DX 1) within the ATM lobby. Malangone asserted that DX 2a showed him standing to his left with his hands in the air. DX 2b showed Malangone with his hands in the air and Respondent entering the lobby. As Respondent did so, he told Malangone to "get on the floor, put your hands up." In response, Malangone turned around, moved to the center of the lobby, and put his hands "to the side."

Malangone contended that DX 2c showed him "going towards the floor" and Respondent pointing his gun at Malangone. At this point, Malangone testified, he had his hands at his sides so that he could keep his balance while getting on the floor.

Malangone stated that as he lowered his hands, Respondent picked up his leg and kicked him in the torso. He testified that DX 2f displayed this. As a result, Malangone was propelled to the floor. Respondent hit him with his gun on the back right side of his head. This, Malangone

asserted, was seen in DX 2h. He was prostrate on the floor after being struck and Respondent was on top of him. Malangone did not move his hands and Respondent did not touch them.

Malangone was handcuffed. He testified that Detective Angel Lopez entered the ATM lobby and assisted in the handcuffing. Lopez also struck Malangone in his "back leg" with a "baton." Respondent and Lopez helped Malangone get up.

Malangone testified that DX 2t showed him in handcuffs with blood streaming down the side of his face. DX 2u showed spots of blood by the desk in the lobby used for deposit slips and such; these were from his injury.

Malangone was arrested. He was treated by medical personnel at the 94 Precinct station house for swelling on the right back side of his head and a laceration. This was about an hour after he received the injury. The next morning, after he was released, he went to the hospital. When the Advocate asked, "Why did you wait until you got released from jail to before you went to the hospital?," he answered that he "didn't want to stay there," and wanted to get through the process and "leave right away." He did not trust "what they were going to do to me." At the hospital, "[t]hey cleaned me up and they stitched me up."

Malangone admitted that this was not the first time he had been arrested. In February 2003, he pleaded guilty to "[a] small amount of pot," and pleaded guilty to disorderly conduct in August 2009. He was not sentenced in either case. In October 2004, he was arrested in Pennsylvania for "[f]leeing the police," classified as resisting arrest. He was 16 or 17 years old and had bought his first car. But "[i]t wasn't licensed, it wasn't registered," and when he got pulled over, he became scared and took off. He never physically resisted arrest. He pleaded guilty and served four months in jail. In the "throwing the garbage can through the window" case (the offense for which Respondent and the other detectives were seeking to take Malangone

into custody), he pleaded guilty and served 30 days in jail. Concurrent with this sentence was a sentence for disorderly conduct, which arose from a “verbal incident” between Malangone and a friend.

Malangone testified that he had retained an attorney and acknowledged the existence of a lawsuit against the City of New York. He claimed not to know how much money was asked for in the suit.

On cross examination, Malangone admitted that in 2003, he actually pleaded guilty to criminal possession of a controlled substance. He admitted that in 2007, he pleaded guilty to reckless endangerment, but denied that this was one of several different dockets covered under the 30-day jail sentence. There were only two cases.

Malangone admitted that in the Pennsylvania case, he used an alias, “Michael Sarida.” He was young and thought he would get out of the situation. He admitted that this youthful indiscretion was only four years before the incident concerning Respondent.

Malangone admitted that he knew the police were looking for him on September 21, 2008. This was for throwing a garbage pail through the window of his now-mother-in-law’s house. He stated that he could not recall how long he knew they were looking for him, even whether this was for at least two weeks. Malangone admitted that the police called his house and spoke with his brother, trying to get Malangone to appear. Malangone had his lawyer call back. He admitted, nevertheless, that he did not surrender. He was going to wait for the police to catch him, and that was what happened. He denied that he was looking for a confrontation with police.

Malangone insisted that he was surprised to see the police in front of the bank. He could not explain this in light of his knowledge that they were looking for him. He did not know what they were there for and it did not cross his mind that it was the garbage pail incident.

Malangone admitted that he did not drop to the ground immediately in front of the ATM. He asserted that he “turned around to the center of the room and went to the floor.” Malangone said that he was nervous because Respondent was pointing a gun at him.

When asked, “[Y]ou had this entire area to get down on the ground, but you choose to walk across the vestibule of the bank and get down over by the window,” Malangone replied that it was not a big lobby. It would have been possible for him to turn around right at the ATM and get on the ground, but he wanted to keep his balance. He had not gotten down by 4:56:53 p.m., as seen in DX 2g (the first image, DX 2a, showing Malangone with his hands up at the ATM, was recorded at 4:56:47 p.m.). He was going to get down in front of the desk, and was trying to do so when Respondent kicked him. The kick occurred as Malangone was lowering his hands.

When asked if he would agree that his body was facing away from Respondent when he was getting on the ground, Malangone retorted that his face was facing Respondent. When counsel pressed, Malangone admitted that his body was facing away.

Malangone admitted telling a Civilian Complaint Review Board (CCRB) investigator in his original call to them that Respondent hit him twice in the head with a “billy club,” and that he was already on the ground when this happened. He also stated that his knees were on the floor with his hands up when Respondent kicked him. In a follow-up interview, Malangone told a CCRB investigator that his palms were on the ground when Respondent got on top of him and “whacked” him. He told the investigator that he knew it was a baton because he saw it.

Malangone admitted that in the second CCRB interview, he told the investigator that by the time Respondent was entering the bank, he was already on the floor, on his knees with his hands up. DX 2g disproved this.

Malangone denied that paramedics provided “some sort of treatment” to him at the station house. Rather, “they just took a look at me.” They said he needed stitches, but he refused. He had dried off the blood by the time he got to central booking.

Malangone admitted that the CCRB investigator told him that they performed a records search on the hospital where he said he went for treatment, but they could not find any records under his name.

Malangone testified that he was taking [REDACTED], an [REDACTED] medication, on September 21, 2008. He denied that [REDACTED] carried the risk of excessive bleeding even from a minor laceration. He then denied telling paramedics that he was taking [REDACTED] and testified that he took the medication approximately two years before the incident. He told the paramedics that diabetes and blood clots ran in his family. On the day of the incident, he was only taking medications for high blood pressure.

Malangone denied knowing whether his lawsuit was seeking damages, but later conceded the point. He had never seen a notice of claim or the suit itself.

On re-direct examination, Malangone denied ever raising his fists to Respondent.

Malangone told the CCRB that he was struck with a baton because while it happened very quickly, he saw a black object in Respondent’s hand. Then, as he was going to the floor, Respondent kicked him. Malangone’s head was turned toward the ATMs when Respondent hit the back of his head. “So there was no way I could really tell if it was a baton or a gun. But in a glimpse from the corner of my eye I saw something black, and I thought it was a baton.” Malangone viewed photographs and videos of the incident after he made the statements to the CCRB.

On re-cross examination, Malangone agreed that neither DX 2h nor 2i showed Respondent's gun making contact with his head. He also agreed that DX 2l and 2m showed him laying on his side, not his stomach.

Upon questioning by the Court, Malangone testified that he went to [REDACTED] Medical Center's emergency room. This was where he told the CCRB he received treatment.

Stipulation

The parties stipulated that CCRB investigators made diligent efforts to obtain records under the names Neal Malangone and Michael Sarida from [REDACTED] Medical Center and nearby hospitals ([REDACTED] Medical Center sometimes is known as [REDACTED] the investigators also searched [REDACTED] Medical Center). The investigators were unable to find any records. The CCRB served subpoenas on [REDACTED] and [REDACTED] both of which were returned as no records present.

Katarzyna Wyka

Wyka was 24 years old. She was employed as a waitress and bartender. She was married to Malangone [REDACTED].

On September 21, 2008, Wyka lived with Malangone and his mother. At the time, Wyka and Malangone were boyfriend and girlfriend. Shortly before 5:00 p.m. on that date, she left the house and went to the bank with Malangone.

Malangone entered the bank and Wyka waited outside. She was about four feet from the entrance. He went to the farthest right ATM. There was nothing blocking Wyka's view inside the bank.

Wyka testified that a black sedan pulled up and hit the brakes really hard. Malangone turned to face her. Respondent exited the vehicle and ran, pointing his gun toward Malangone. Respondent said, "Don't move motherfucker." Malangone turned and did not completely face Respondent but "like looking at him standing sideways." Malangone raised his hands.

When asked, "Did there come a time when you observed another object in Detective Gross' hands?," Wyka answered, "At the time I I thought I saw a baton."

Malangone put his hands to his sides once Respondent entered the bank. Respondent struck Malangone in the head with his right hand, using the gun. Wyka admitted that "[a]t the time I believed it was a baton." She changed her account once she observed the surveillance footage. Thus, her "initial statements to CCRB" were incorrect.

After Respondent struck Malangone, he fell to the floor. Another detective approached Wyka and "pulled walked" her "to the edge of the curb." When Malangone was taken out of the bank, he was bleeding from his head. There was blood on his face.

On cross examination, Wyka admitted that she told the CCRB investigator that Malangone got on his knees voluntarily before Respondent entered the ATM lobby. This was not accurate, as the video showed that when Respondent entered, Malangone was standing.

Wyka admitted being certain on the date of the interview, which was before she saw the surveillance, that Respondent struck Malangone with a baton. She agreed that she had indicated to the investigator from the CCRB that Malangone was already on his knees when Respondent struck him.

Wyka was aware of Malangone's lawsuit. After first denying that she discussed this matter with him, and also noting, "His testimony is between him and his lawyer," Wyka admitted that they had discussed it. Malangone told Wyka that he was struck with the baton.

Wyka admitted that Malangone left the ATM and walked all the way to the desk, but this was just a few steps. Wyka admitted telling the CCRB investigator that after Respondent pointed the gun at Malangone and told him to stop, “Neal put his hands up, he doesn’t move.” This was incorrect. The video surveillance changed her testimony.

Respondent’s Case

Respondent called Detective Jaime Arroyo and Detective Angel Lopez, and testified on his own behalf.

Detective Jaime Arroyo

Arroyo was assigned to the 94 Precinct Detective Squad. The 94 Precinct covered Greenpoint, Brooklyn. Arroyo had worked with Respondent for about five years.

Arroyo was the assigned detective on an assault case involving Malangone. Malangone threw a garbage can through the window of his mother-in-law or ex mother in-law. The glass shattered onto the woman, causing her to sustain “small cuts.”

Arroyo testified that Malangone had an extensive history of arrests for assault. There was the police chase as well. This led Arroyo to conclude that Malangone “had some type of violent nature, a little aggressive.” Arroyo let Respondent and Lopez know this.

In order to locate Malangone, Arroyo conducted surveillance and canvasses. He contacted Malangone and told him that he needed to come in to the 94 Squad. Malangone responded, “You want me, come get me. You’ll see what happens if I come after him basically.” Arroyo alleged that when he spoke to Malangone’s attorney, the attorney said that Malangone

was not cooperating and that he had advised him not to surrender. Arroyo also spoke to Malangone's brother and mother, who said that he was not going to surrender.

On September 21, 2008, Arroyo, Lopez and Respondent conducted surveillance at Malangone's residence. This was within the confines of the 104 Precinct. Arroyo and Lopez were in one car and Respondent was in another. They had information that Malangone was about to leave the residence.

Arroyo testified that Wyka exited the building and looked around intensely. She made a hand gesture, waving toward her body for someone to come out of the building. Malangone came out, but prior to doing so, he clasped his hands together as though he was making a "gun" with both hands. He was "kind of pointing" to the left, right and forward.

Malangone's gesture "troubled" Arroyo. "It was like a crazy gesture . . . I didn't know what to think if he possibly had a gun or not . . . but it was a little bizarre for me." Malangone had not seen the detectives.

Arroyo conveyed what had occurred to Respondent. He also radioed for the 104 Precinct to provide backup. As they were following Malangone, Arroyo got stuck in traffic, so Lopez got out and walked.

By the time Arroyo parked the car, Respondent and Lopez had Malangone in custody inside a Chase Bank branch. Wyka was there, some distance from the bank. Arroyo observed that Malangone was bleeding from the top of his head. There was not a lot of blood, but it was streaking down his face.

Arroyo was the arresting officer for Malangone's case. Four to five hours after the arrest, he was taken to central booking (see Respondent's Exhibit [RX] A, booking photograph, showing little to no blood).

Respondent informed Arroyo that he approached Malangone inside the bank, but Malangone “did not basically comply with any lawful orders.” Respondent pushed him to the ground and Malangone lay on his own arms so that Respondent could not handcuff him. He also was “kicking out his feet.”

Arroyo testified that Malangone was hostile and did not want to be treated by Emergency Medical Service (EMS) personnel. Eventually he relented and allowed them to render some aid. Arroyo told EMS that Malangone had sustained a small laceration above his head.

On cross examination, Arroyo confirmed that the RX A photograph was taken before EMS treated Malangone.

Arroyo denied ever being threatened by “a criminal defendant” prior to this case. He asserted that he did not recall if Malangone’s record included possession of a firearm. Arroyo admitted having no reason to believe Malangone possessed a firearm, based on his prior convictions. Malangone was not, in fact, in possession of a gun on the date in question.

Arroyo admitted that Respondent and Lopez indicated to him that Malangone was injured inside the bank. Respondent told Arroyo that after Malangone was pushed to the ground, he hit his head on the ground.

Detective Angel Lopez

Lopez was assigned to the 94 Squad. On the date of Malangone’s arrest, while at the command, Arroyo asked Lopez to assist in the apprehension “because this guy likes to resist.” There were two arrests in which Malangone had fought with police, according to Arroyo.

Lopez and Arroyo went to Malangone’s address, while Respondent went in a separate vehicle. First a woman exited the residence, followed by Malangone. He gestured, pointing left

and right with hands and fingers pressed together. He was pretending to have “either a weapon or a firearm.” Lopez did not really think anything of it and figured Malangone was “[j]ust being a character.” He did not believe Malangone had a weapon or that he saw the detectives.

Lopez and Arroyo followed Malangone as he walked. They got stuck in traffic, and Respondent got out of his vehicle. Lopez left his vehicle as well. A tow truck driver, who might have had a police scanner, told Lopez they were in the bank.

Because of sun glare, Lopez could not see inside the bank until he entered. Respondent and Malangone were alone inside for less than 10 seconds. The door was just about to close before Lopez grabbed it (DX 1 actually showed someone holding the door open for Lopez from outside). Once Lopez entered, he observed Malangone “on his way down,” with his legs in the air, just about to hit the floor. Lopez protected himself from being kicked by Malangone, using his expandable baton to block his legs. Lopez also handcuffed Malangone.

Lopez testified that he did not see Respondent strike or kick Malangone, or use unnecessary force on him.

Lopez noticed that Malangone had an injury. There was blood on his forehead, but Lopez did not know how it got there. He did not discuss the question with Respondent. EMS responded to the scene but Malangone refused treatment. Arroyo did not recall if Malangone was “cleaned up” at the scene.

Lopez and Respondent attempted to transport Malangone to the 94 Precinct station house, but he refused to put his legs in the vehicle.

On cross examination, Lopez agreed that Malangone was not bleeding when he entered the bank, so it was fair to say that he received the injury inside the bank. Lopez did not observe any struggle between Respondent and Malangone when he entered the bank. The injury must

have occurred before Lopez entered. Lopez noticed the blood on top of Malangone's head when he and Respondent picked up Malangone from the floor. Malangone did not resist being handcuffed.

Lopez denied discussing the case with Arroyo.

On re-direct examination, Lopez testified that he did not see "any physical force" that would explain how Malangone received the injury.

Respondent

Respondent presently was assigned to the Missing Persons Squad but was on line-of duty sick status as the result of a spinal cord injury. On September 21, 2008, he was assigned to the 94 Squad. He previously had assisted Arroyo and the previously-assigned detective in attempting to apprehend Malangone. Respondent was aware that Malangone had thrown a garbage can through a window, lacerating his mother-in-law's leg. Malangone's record included resisting arrest, leading the police on chases, assaults and narcotics cases.

At one point, Malangone's brother came to the station house and challenged the previously-assigned detective to a fight. The brother was about 6 feet, 8 inches tall and worked, like Malangone, as a bouncer. Another time, Arroyo and Respondent went to apprehend Malangone, but his brother saw them, "and Neal never came out. So we knew his brother was cooperating with him."

In the early afternoon of the date in question, Respondent went with Arroyo and Lopez to apprehend Malangone. They went in separate vehicles in order to cut off routes of escape in case Malangone fled.

Arroyo notified Respondent that Malangone left the residence and acted like he had a firearm. Arroyo gave Malangone's heading and requested assistance from the 104 Precinct.

Respondent observed Malangone and Wyka, then observed only Wyka outside the bank. Respondent figured Malangone was in the bank. He warned a tow truck driver to stay outside because Malangone might have had a firearm, and walked up the ramp to the bank. Respondent shouted at Malangone two or three times to put his hands up and get on the ground. DX 2a showed this moment.

Respondent was wearing a raid jacket and had his shield on his hip. He told Malangone perhaps 10 times to get on the ground.

Malangone "half put his hands up" in front of his chest and walked toward the door. When Respondent entered the bank, Malangone bladed his body. Respondent believed he was hiding a weapon. Respondent had his gun pointed toward Malangone. Slowly, Malangone began to drop his hands. He walked approximately 15 feet across the bank, almost directly in front of Respondent, clenched his left hand and cocked back with his right.

DX 2c showed Respondent entering the bank and Malangone blading his body, walking toward the desk. In Respondent's mind, Malangone was refusing to heed what he was saying. Malangone's arm was raised above his waist, suggesting that he was about to throw a punch. Respondent still was yelling at Malangone to get on the ground and put his hands up.

Respondent testified that he believed Malangone was going to try to assault him or "grab a weapon." He could have been trying to use the desk as a weapon as well. Because Malangone's body was bladed, Respondent could not see what, if anything, was in his "hand." DX 2d showed Malangone blading his body and clenching his left fist.

Malangone had not said anything to Respondent up to this point. He was just staring at Respondent.

Lopez had not yet arrived. Respondent knew that Arroyo and Lopez had gotten “stuck at the light.” In response to Malangone, Respondent lifted his knee to defend himself. DX 2g showed this maneuver, which was taught to him in the Police Academy. The photograph showed Respondent pulling his firearm away so that Malangone could not grab it. Malangone was in a “fighting stance.”

Respondent believed that Malangone saw Lopez and it “seemed like he was stopping the punch.” Respondent dropped his knee and pushed Malangone to the ground as hard as was necessary. Respondent noted that he weighed 350 pounds. He asserted, nevertheless, that he used the minimum force necessary.

Respondent stated that he pushed the back of Malangone’s shoulder with his left hand. In his right hand he had his firearm. He pointed the gun to the side and away from Malangone. DX 2h showed this, as did DX 2i. The latter photograph showed Malangone resisting and “tensing up” and pushing back.

Respondent asserted that Malangone hit the ground pretty hard and might have struck his head. It was a “cement tile” floor. Respondent acknowledged that he observed “a trickle of blood” on Malangone when he helped him off the ground. He did not know how he was injured.

Malangone lay on his side and “refused to get flat.” He stiffened his body, held “his arms under” and kicked his legs around. Respondent put his foot “near” Malangone’s back. He told Malangone to lie flat, stop moving and place his feet on the ground, but Malangone kept kicking. DX 2l showed Respondent telling Malangone to lie flat and put his hands out, but he refused.

Lopez arrived several seconds later. He frisked Malangone for a weapon, pulled Malangone's arms out from under him and handcuffed him.

Respondent did not "intentionally strike" Malangone with his firearm or any other object. He observed Lopez "come out with his asp, but I really didn't see the full strike." Respondent saw Lopez lay the expandable baton against Malangone's legs. It was not Respondent's intent to cause Malangone any injury.

On cross examination, Respondent admitted that the detectives did not make a police report when Malangone's brother came to the station house and threatened them. The brother had a history of assault as well and had done jail time.

Respondent did not know whether Malangone's prior assaults involved a firearm. When asked, "[D]id you review his criminal record before you went out . . . to apprehend him," Respondent replied, "I did not see a firearm, no."

Respondent claimed that when he first told Malangone to put his hands up, he had one hand at his shoulder and another to cover his face. This was seen in one of the photographs.

Malangone did not have his hands fully in the air, i.e., above his head, when he was standing at the ATM. DX 2a showed one of Malangone's hands level with his chest or shoulder. Respondent claimed that the photograph showed Malangone with his right hand not above his head, and his left hand barely above his head. His arms were raised as if ready to fight. Respondent agreed that the object in Malangone's left hand, as seen in the photograph, was not a weapon. In fact, Respondent never saw Malangone with a weapon inside the bank.

Respondent conceded, however, that Malangone's hands were "up in the air," and that this was the beginning of compliance with his orders. Respondent knew of cases where a

suspect pulled out a firearm at the last second even though he had his hands in the air. “You can’t go by a general scenario of his hands are up, that’s it, end of story.”

Respondent did not tell Malangone where to get down on the floor. He disagreed that Malangone moved to an area of the lobby where it was easier for him to get down than right by the ATM.

Respondent asserted that DX 2d showed Malangone cocking back his right hand.

Respondent denied that DX 2f showed him kicking Malangone in the torso with his leg. It was “more of a knee” to begin with, and “the next frame photo” demonstrated that there was no contact. Malangone “doesn’t move, he goes to his knees and stays there.” If Respondent, a 350-pound individual, “struck you, you would move.”

Respondent contended that both Malangone’s head and body hit the ground. It was the side of his head that hit the ground. Respondent agreed that DX 2h showed his firearm near Malangone’s head, although he contended that it was the left side of his head. He conceded that it was possible that “a few milliseconds” later, Respondent’s firearm made contact with Malangone’s head.

On re direct examination, Respondent agreed that any injury sustained by Malangone “would have been inadvertent or accidental to the struggle that he was putting up on that date.”

Upon examination by the Court, Respondent confirmed that there was no arrest of Malangone’s brother for the station house incident.

Respondent characterized his speed when approaching Malangone in the bank lobby as a “quick walk.” Malangone also was coming toward Respondent.

FINDINGS AND ANALYSISCase No. 2010-0051

The charges here revolve around an altercation between Respondent and Neal Malangone. Malangone was wanted for assault and criminal mischief after throwing a chair through a window of the residence of the mother of his girlfriend (wife at the time of trial), Katarzyna Wyka. This was within the confines of the 94 Precinct. Respondent and other members of the 94 Precinct Detective Squad attempted to have Malangone turn himself in. According to Respondent's witnesses, Malangone refused and said that the police would have to come get him. Malangone's brother allegedly came to the precinct and threatened the police with violence (although the brother was not arrested). Both men were over 6 feet tall. Malangone's attorney supposedly told detectives that he had advised Malangone not to turn himself in.

On September 21, 2008, detectives received information that Malangone would be leaving his residence. They surveilled him and observed him leaving, but when he exited, he looked to his left and right and clasped his hands in a "gun" gesture. The detectives did not see a gun but it was said that this gave them some idea of Malangone's state of mind.

Specification No. 1

The first specification charges that Respondent "kicked Neal Malangone in the torso, without proper police necessity." Malangone entered a Chase Bank to use the ATM. As he was at the kiosk, Respondent entered. Although the scene was recorded on video surveillance, the parties disagreed about what happened when Respondent entered the bank. The Department asserted that while Malangone "attempted to comply" with Respondent's instructions to get on

the ground, Respondent kicked him in the torso, propelling him to the ground. Respondent contended that Malangone was not compliant, and that he was taking what was at least akin to a “boxer’s stance” by fisting his hands and cocking one as to throw a punch. Malangone also kept walking, rather than get down where he was standing, which was at the front of the ATM. Thus, Respondent brought up his knee to kick Malangone in the torso in order to gain control of the situation. As he did so, however, Malangone got onto the ground, so Respondent held back and did not kick him.

The video surveillance consisted of three separate cameras covering three separate angles within the ATM lobby. The feeds were not actually moving pictures; rather, the cameras took about one photograph per second. Thus, the videos appeared more like a bumpy feed than a continuous picture.

Thus, although the cameras did not capture Respondent kicking Malangone, that is not the end of the inquiry because the cameras might have missed a literal split second of contact. Nevertheless, a review of the surveillance in its entirety supports Respondent’s position. Camera 2 presented the clearest image. It showed, at 4:56:53 p.m., Respondent lifting his right foot, preparing to kick Malangone. Malangone was standing up with his body bladed left toward Respondent. In the next frame, recorded within the same second, Malangone was kneeling with his left knee on the ground and crouching on his right knee. Respondent was standing on both feet. Camera 3 presented an image at 4:56:53 p.m. that apparently came just before the second image from Camera 2. It showed Respondent’s right foot just about to touch the ground and Malangone in the process of crouching. Camera 1 was from such an angle that it did not capture much useful footage of the confrontation.

All of this supports Respondent's assertion that he cocked back his foot before he could strike Malangone. In their totality, the images show Respondent halting the forward progress of his foot before it might have made contact.

Other objective evidence corroborates Respondent's account. Malangone was seen by paramedics at the 94 Precinct station house. The only documented injury was a minor laceration to Malangone's head. The Court observed both individuals in person and on the video, and Respondent's testimony is correct: if he, who weighed 350 pounds, had kicked Malangone, certainly a big individual as well, in the torso, there would have been an injury to the latter man's torso. Although Malangone testified that later he went to the hospital a visit for which the neither the Department nor CCRB could find any records he nonetheless testified that what happened there was that, "They stitched me up. They cleaned me up and they stitched me up." An injury from a kick to the torso would have required more than that.

Accordingly, Respondent is found Not Guilty of Specification No. 1, kicking Malangone in the torso.

Specification No. 2

The second specification charges that Respondent "struck Neal Malangone on the right rear side of his head with a blunt instrument, without proper police necessity." The Department alleged that as Respondent was gaining control over Malangone, Respondent struck the suspect in the right side of the head with a pistol, causing a laceration and bleeding. Respondent denied doing so and suggested that Malangone was injured accidentally when his head hit the floor or bank lobby table as Respondent was trying to gain control of an uncooperative suspect, or that he was unintentionally nicked by the gun in that process. Respondent also pointed to the fact that

Malangone told paramedics that he was taking Coumadin, but asserted that this blood anticoagulant medication had a side effect of causing an excess of bleeding from relatively minor contact.

Camera 2, at 4:56:53, showed Respondent with his left hand on Malangone's back as Malangone was crouching. Respondent was holding his weapon with his right hand, which was moving toward Malangone. In the next frame, the gun was against the right side of Malangone's head as he was curled on the ground. In the next ten seconds, one of the other detectives, Lopez, was in the process of handcuffing Malangone. As Lopez did so, the suspect brought his left hand around his head to cup the right side. By 4:57:11, Malangone was prostrate with his head turned to the side. By 4:57:14, blood could be seen dripping onto the floor next to the right side of Malangone's head.

The video surveillance indicates that Respondent did, in fact, strike Malangone on the right side of his head, causing an injury. Nevertheless, it does not appear that this was intentional on the part of Respondent. It appears that he was attempting to gain control over a suspect by placing both his hands on him. This was justified, as Malangone was not completely compliant. Respondent was wearing a Department raid jacket and testified that he was wearing his shield on outer clothing. It was not disputed that Malangone knew he was an officer. Malangone had ample time and space to keep his hands raised and get down on the ground when Respondent first told him to. Instead, he walked across the lobby and held his hands and arms in a way that suggested he was ready to fight. Even when Respondent reached Malangone, he did not get on the floor until Respondent physically placed his hands on him. Respondent also had his firearm in his right hand. This, too, was justified, as he was making an arrest for two violent acts.

As a result, it appears that the gun, in Respondent's right hand, made contact with the right side of Malangone's head. This contact appears, from the video, to have been incidental to the authorized conduct of taking Malangone into custody, physically, with both hands. Cf. *Case No. 82418/06*, Police Comm'r's mem. (Aug. 5, 2008) (in case where Respondent tried to keep individual from entering a fire building, he was found Not Guilty of excessive force, as he "took necessary and appropriate action during this chaotic and evolving incident and used 'force' in good faith, in a necessary manner.").

Had Respondent intended to strike Malangone with a blunt instrument ("without proper police necessity" as alleged in the specification), there would have been a greater injury than a few drops of blood from a wound that closed on its own. Cf. *Case No. 80628/05*, p. 40 (Mar. 29, 2006) (officer guilty of "excessive force" when he, a large individual, pushed subject back onto vehicle using hand holding a loaded firearm, rather than officer's body weight, leading to a three-centimeter laceration requiring staples; this was excessive, regardless of whether it was intentional or accidental). This is especially true in light of the fact that Malangone, according to what he told EMS, was taking Coumadin. The few drops of blood are consistent with an incidental contact upon someone taking Coumadin, as even a minor skin laceration might cause bleeding. But if Respondent had struck Malangone directly and intentionally with a gun, that would have led to much more severe bleeding, with or without Coumadin.

As such, the Department failed to prove that Respondent struck "Malangone . . . with a blunt instrument, without proper police necessity." Thus he is found Not Guilty of Specification No. 2.

Case No. 2011 3510

Having pleaded Guilty to the specifications in this case, Respondent is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on June 30, 1992. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has pleaded Guilty, without offering mitigation testimony, to charges and specifications resulting from an incident that occurred in August 2010. His co-Respondent pleaded Guilty to similar specifications and the following facts are taken from that case. The co-Respondent was friends with the owner of a strip club. The owner told the co-Respondent that a dancer was missing her purse. Video surveillance showed an individual taking the purse; he was identified through his driver's license. The co-Respondent and Respondent went to the individual's residence. There, without making an arrest, they told the individual that if he gave back the money, everything would be taken care of. For this misconduct and an unrelated domestic incident, the co Respondent forfeited 30 vacation days (see Case No. 2010-3134, signed Jan. 24, 2012).

This misconduct left the impression that the co-Respondent and Respondent were acting as hired muscle for a friend who owned a strip club. That is an industry rife with organized crime involvement. The whole incident created an enormous appearance of impropriety.

Accordingly, the 30 vacation days forfeited by the co-Respondent is appropriate here as well. Thus, the Court recommends that Respondent forfeit 30 vacation days for his misconduct.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
DEC 27 2012

RAYMOND W. KELLY
POLICE COMMISSIONER

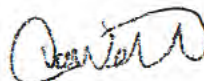
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE DAVID GROSS
TAX REGISTRY NO. 901639
DISCIPLINARY CASE NOS. 2010-0051 & 2011-3510

Respondent's last three annual evaluations are as follows: Respondent received an overall rating of 4.0 "Highly Competent" in 2011, a 4.5 "Highly/Extremely Competent" in 2010, and a 4.5 "Highly/Extremely Competent" in 2009. He has been awarded 22 medals for Excellent Police Duty, six medals for Meritorious Police Duty, and one Commendation. [REDACTED]
[REDACTED] He has a total of 434 arrests, including 287 arrests for felonies.

From March 2009 to June 2009, Respondent was placed on Level 1 Force monitoring. In June 2009, this was upgraded to Level 2 as a result of having received three or more CCRB complaints in a one year period. He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials